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# International Law in the Obama Administration's Pivot to Asia: The China Seas Disputes, the Trans- Pacific Partnership, Rivalry with the PRC, and Status Quo Legal Norms in U.S. Foreign Policy

Jacques deLisle

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# INTERNATIONAL LAW IN THE OBAMA ADMINISTRATION'S PIVOT TO ASIA: THE CHINA SEAS DISPUTES, THE TRANS-PACIFIC PARTNERSHIP, RIVALRY WITH THE PRC, AND STATUS QUO LEGAL NORMS IN U.S. FOREIGN POLICY

*Jacques deLisle\**

*The Obama administration's "pivot" or "rebalance" to Asia has shaped the Obama administration's impact on international law. The pivot or rebalance has been primarily about regional security in East Asia (principally, the challenges of coping with a rising and more assertive China—particularly in the context of disputes over the South China Sea—and resulting concerns among regional states), and secondarily about U.S. economic relations with the region (including, as a centerpiece, the Trans-Pacific Partnership). In both areas, the Obama administration has made international law more significant as an element of U.S. foreign policy and has sought to present the U.S. as defending and promoting status quo international legal norms, largely against challenges posed by China. This approach has been somewhat more plausible on security / South China Sea issues than on economic / TPP issues. At the end of the Obama administration, significant uncertainty looms about the prospects for this aspect of the Obama-era approach international law and the international and domestic conditions that helped to produce it.*

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The Obama administration framed its "pivot" or "rebalance" to Asia primarily in terms of geopolitics and foreign policy. Yet, the

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\* Jacques deLisle is the Stephen A. Cozen Professor of Law, Professor of Political Science and Deputy Director of the Center for the Study of Contemporary China at the University of Pennsylvania.

policy also has had significant international legal elements and implications. The promise to rebalance the U.S.'s efforts and attention toward Asia—implicitly, toward East Asia—may have fallen short of expectations,<sup>1</sup> but the pivot did push East Asia-related questions much more toward the center of the U.S.'s practice of, and approach to, international law. The Obama administration's response to disputes over territorial sovereignty and maritime rights in the South China Sea (and the East China Sea), and its quest for the Trans-Pacific Partnership as a "twenty-first century" trade agreement (and a pact that reaches well beyond trade in regulating an increasingly global economy) are primary legal aspects of the pivot or rebalance.

The U.S.'s "pivot" or "rebalance" toward East Asia (including Southeast Asia) was also a shift *away* from a focus on another geographic area: the Middle East (or West Asia, including Iraq) and South Asia (more specifically, South-Central or Southwest Asia, including Afghanistan and Pakistan). As is often the case, these different parts of the world have presented different political and, in turn, legal challenges for the United States. Thus, the pivot also meant a shift in the subject matter focus of the U.S.'s practice and agenda in international law. During the George W. Bush administration, the defining issues in international law for the United States centered on the fall-out of 9/11 and the wars in Iraq and Afghanistan: the rights and obligations of states in combatting terrorist organizations, the use of military force—with and without UN Security Council authorization—to intervene in states that were

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1. See, e.g., MICHAEL GREEN ET AL., ASIA-PACIFIC REBALANCE 12025: CAPABILITIES, PRESENCE, AND PARTNERSHIPS 195 (2016), [http://csis.org/files/publication/160119\\_Green\\_AsiaPacificRebalance2025\\_Web\\_0.pdf](http://csis.org/files/publication/160119_Green_AsiaPacificRebalance2025_Web_0.pdf) [<https://perma.cc/N3HN-52QG>] (finding "consistent confusion about the rebalance strategy and concerns about its implementation" among U.S. government agencies and U.S. allies and partners in East Asia); Joshua Keating, *Did the Obama Administration Ever Actually Pivot to Asia?*, SLATE BLOG (Apr. 21, 2014, 5:52 PM), [http://www.slate.com/blogs/the\\_world\\_/2014/04/21/obama\\_s\\_asia\\_t\\_rip\\_did\\_the\\_administration\\_ever\\_actually\\_pivot\\_to\\_asia.html](http://www.slate.com/blogs/the_world_/2014/04/21/obama_s_asia_t_rip_did_the_administration_ever_actually_pivot_to_asia.html) [<https://perma.cc/ND94-8RPG>] (stating that, "despite all the talk of its growing strategic importance, East Asia rarely seems to be the center of attention in Washington"); Joshua Kurlantzick, *Pivotal Moment*, DEMOCRACY (2016), available at <http://democracyjournal.org/magazine/39/pivotal-moment/> [<https://perma.cc/SXD3-RGMR>] (describing the pivot as "badly misguided" in focusing on states with little strategic value and facilitating political regression in the region); Fareed Zakaria, *Whatever Happened to Obama's Pivot to Asia?*, WASH. POST (Apr. 16, 2015), [https://www.washingtonpost.com/opinions/the-forgotten-pivot-to-asia/2015/04/16/529cc5b8-e477-11e4-905f-cc896d379a32\\_story.html](https://www.washingtonpost.com/opinions/the-forgotten-pivot-to-asia/2015/04/16/529cc5b8-e477-11e4-905f-cc896d379a32_story.html) [<https://perma.cc/237X-UEAT>] (opining that, "[t]he Obama administration needs to start believing in its own grand strategy.... Washington should focus its energies, attention and efforts on Asia").

found to support terrorism or harbor terrorists, the rules governing treatment of combatants who were not members of the conventional armed forces of states, targeted killings of individuals identified as terrorists, the resort to “enhanced interrogation” or torture, and the imposition of limits on civil liberties—some of which overlap international human rights—under the proffered justification of preventing terrorist acts and disrupting terrorist organizations.<sup>2</sup>

To be sure, many of these issues persisted into the Obama presidency, and the Bush administration’s interactions with international law were not confined to military intervention- and terrorism-related issues. Although the contrast between the two administrations, therefore, should not be overdrawn, the pivot-related shift in the principal geographic and doctrinal concerns for the U.S. in international law is striking. The two most high-profile legal dimensions of the turn to (East) Asia under Obama have had significant similarities and served interdependent policy goals. The Trans-Pacific Partnership (TPP) constitutes much of the economic leg of the mostly security-focused pivot.<sup>3</sup> The strategic pivot—including especially the elements focused on the South and East China Seas—undertakes to provide the security underpinnings for open trade and economic ties in the region and beyond.

In both contexts—the TPP and related issues of international economic law, and the China Seas disputes and associated issues of maritime zones, sovereignty, and security-related international law—the U.S. cast itself as the defender of status quo international legal norms in the face of Chinese positions that have pressed or may portend a revisionist agenda. The U.S.’s stances on both sets of legal issues have been entwined with efforts to assure and engage other regional states and to advance U.S. interests and aims. But the two issue areas also differed in significant ways, including the clarity and robustness of the legal status quo that the U.S. has purported to defend, and the responses to U.S. moves by regional states living in the shadow of frictions, and possibly sharpening rivalry, between the U.S. and the People’s Republic of China (PRC).

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2. See generally Marco Sassoli, *The International Legal Framework for Fighting Terrorists According to the Bush and Obama Administrations: Same or Different, Corrector Incorrect?*, 104 AM. SOC. INT’L L. PROC. 277 (2011); Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 79 INT’L L. STUD. 8 (2003) (discussing the Global War on Terrorism and the use of force).
  3. See generally, KURT CAMPBELL & BRIAN ANDREWS, EXPLAINING THE US ‘PIVOT’ TO ASIA 3-5 (2013) (describing the TPP, strengthening existing alliances in the region, and improving relations with emerging regional powers as the three priorities of the pivot); MARK E. MANYIN ET AL., PIVOT TO THE PACIFIC? THE OBAMA ADMINISTRATION’S REBALANCING TOWARD ASIA 20 (2012) (“Economics and trade are both causes of and instruments for the pivot toward the Asia-Pacific.”).

I. THE CHINA SEAS DISPUTES—TERRITORIAL SOVEREIGNTY,  
MARITIME JURISDICTION, AND REGIONAL SECURITY

The Obama administration presented the “pivot”—later dubbed the “rebalance” and sometimes described as a “return”—to Asia primarily in terms of redefining U.S. priorities and reallocating U.S. resources in ways that were more consistent with the U.S.’s national interests, which were especially great in then-recently neglected but strategically and economically vital East Asia.<sup>4</sup> Underlying Washington’s shift, and its welcome reception in much of the region, was China’s rapid rise in power and China’s actions in pursuit of an agenda that appeared, at best, uncertain and, at worst, assertive and even aggressive.<sup>5</sup> In terms of international security and perhaps more generally, the biggest sources of concern about Beijing’s aims and behavior were the disputes over territory and related rights in the East China Sea (with Japan over the Senkaku / Diaoyu islands and adjacent ocean zones) and in the South China Sea (with Vietnam, the Philippines, Malaysia, and others over various subsets of four groups of islands and rocks, and rights in appurtenant maritime areas).<sup>6</sup>

The disputes between China and its neighbors were long-standing and they produced significant discord which has led to sporadic violent incidents since the 1970s. A relatively long period of relative

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4. See, e.g., Hillary Clinton, *America’s Pacific Century*, FP (Oct. 11, 2011), <http://foreignpolicy.com/2011/10/11/americas-pacific-century/> [<https://perma.cc/G75E-ZB5D>] (“One of the most important tasks of American statecraft over the next decade will therefore be to lock in a substantially increased investment — diplomatic, economic, strategic, and otherwise — in the Asia-Pacific region.”); U.S. Dep’t State, Bureau of Public Affairs, *The East Asia-Pacific Rebalance: Expanding U.S. Engagement* (Dec. 16, 2013), <http://www.state.gov/documents/organization/218988.pdf> [<https://perma.cc/8BGE-ZXMH>] (“Recognizing that America’s future prosperity and security are intertwined with the East Asia-Pacific region, President Barack Obama made a strategic commitment to rebalance our efforts and investments toward Asia.”).
  5. See generally, John J. Mearsheimer, *Can China Rise Peacefully?* NAT’L INTEREST (Oct. 25, 2014), <http://nationalinterest.org/commentary/can-china-rise-peacefully-10204> [<https://perma.cc/FL28-9GCZ>]; Aaron L. Friedberg, *The Future of U.S.-China Relations: Is Conflict Inevitable?* 30 INT’L SECURITY 7 (2005) (addressing possibility of increasingly conflictual relations between China and the United States).
  6. Michael D. Swaine & M. Taylor Fravel, *China’s Assertive Behavior, Part Two: The Maritime Periphery*, CHINA LEADERSHIP MONITOR 8, (2010), available at <http://carnegieendowment.org/files/CLM35MS.pdf> [<https://perma.cc/YF2L-4DFJ>]; Alastair Iain Johnston, *How New and Assertive is China’s New Assertiveness?*, INT’L SECURITY 15-16 (2013), [belfercenter.ksg.harvard.edu/files/IS3704\\_pp007-048.pdf](http://belfercenter.ksg.harvard.edu/files/IS3704_pp007-048.pdf) [<https://perma.cc/B56R-2N2B>].

calm came to an end near the beginning of Obama's presidency, and recurrent tensions and occasional crises have roiled regional relations since then.<sup>7</sup> With China adopting stronger rhetoric, making bolder legal claims, and moving to exercise greater physical control over the contested areas, regional states—ranging from enduringly close formal U.S. allies (such as Japan) to states that had not previously pursued security ties with the United States (such as Vietnam), and others in between (such as the Philippines and Singapore)—pursued or welcomed support from Washington in the face of perceived Chinese threats and challenges.<sup>8</sup>

Although the pivot was articulated largely in terms of geostrategic considerations and somewhat in terms of values, it also was cast in legal terms and conjoined with legal arguments. Those legal arguments presented the United States as a champion of established norms and valuable international public goods—including regional stability and, in turn, prosperity.<sup>9</sup> Often implicitly, at times

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7. *See generally*, M. TAYLOR FRAVEL, *STRONG BORDERS, SECURE NATION: COOPERATION AND CONFLICT IN CHINA'S TERRITORIAL DISPUTES* 267-99 (2008) (discussing China's attempts to strengthen its claim to offshore territory); ALLEN CARLSON, *UNIFYING CHINA, INTEGRATING WITH THE WORLD: SECURING CHINESE SOVEREIGNTY IN THE REFORM ERA* 49-91 (2008) (contrasting China's relatively accommodating stance on land border disputes with its more assertive and uncompromising position on maritime territorial disputes); ROBERT D. KAPLAN, *ASIA'S CAULDRON: THE SOUTH CHINA SEA AND THE END OF A STABLE PACIFIC* 5-50 (2014) (discussing China's rising interest in and capacity to assert control over the South China Sea and implications for friction and conflict in the region).
  8. *See generally*, *THE NEW US STRATEGY TOWARDS ASIA: ADAPTING TO THE AMERICAN PIVOT* (William T. Tow & Douglas Stuart, eds., 2015) (providing an overview and examples of generally positive regional reactions); ROBERT G. SUTTER ET AL., *BALANCING ACTS: THE U.S. REBALANCE AND ASIA-PACIFIC STABILITY* 19-25 (Aug. 2013), [http://www2.gwu.edu/~sigur/assets/docs/BalancingActs\\_Compiled1.pdf](http://www2.gwu.edu/~sigur/assets/docs/BalancingActs_Compiled1.pdf) [<http://perma.cc/KA6U-2AR3>] (discussing the responses of Northeast Asia, Southeast Asia, South Asia, and Asia-Pacific to the Obama administration's rebalancing of relations).
  9. *See, e.g.*, Tom Donilon, National Security Advisor, Press Release, Remarks on The United States and the Asia-Pacific in 2013 (Mar. 11, 2013), <https://www.whitehouse.gov/the-press-office/2013/03/11/remarks-tom-donilon-national-security-advisor-president-united-states-an> [<http://perma.cc/5688-M95J>] (“[T]he U.S. rebalance toward the Asia-Pacific is also a response to the strong demand signal from leaders and publics across the region for ... sustained attention to regional institutions and defense of international rules and norms . . . . The United States is firmly opposed to coercion or the use of force to advance territorial claims. Only peaceful, collaborative and diplomatic efforts, consistent with international law, can bring about lasting solutions that will serve the interests of all claimants and all countries in this vital region.”); John Kerry, Sec’y of State, Remarks on

explicitly, and sometimes in response to China's stated opposition to the U.S.'s role, the Obama administration depicted China as the party that was violating or undermining existing international legal norms.<sup>10</sup> U.S. stances on international legal issues relevant to the China Seas disputes are part of this pattern.

The U.S. has long insisted that it takes no official position on the question of who has sovereignty over the landforms—and, thus, who can claim the limited but valuable rights over adjacent waters and continental shelves that a state with territorial sovereignty may enjoy under the international law of the sea.<sup>11</sup> In the South China Sea context, Washington coupled this agnosticism on sovereignty with sharp criticism of what the U.S. saw as crisis-risking unilateral moves—predominantly by China—to disrupt the status quo, including actual control.<sup>12</sup> In the East China Sea setting, the U.S.'s position was

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U.S.-China Relations (Nov. 4, 2014) (transcript available at <http://www.state.gov/secretary/remarks/2014/11/233705.htm> [<https://perma.cc/7QKG-5DUQ>]) (describing “specific opportunities that define the rebalance, goals” which include “reducing tensions and promoting regional cooperation by strengthening the institutions and reinforcing the norms that contribute to a rules-based, stable region.”); Robert D. Kaplan, *America's Pacific Logic*, STRATFOR (Apr. 4, 2012, 8:59 PM), <https://www.stratfor.com/weekly/americas-pacific-logic> [<http://perma.cc/A79B-QRNU>] (“If American power was diminished, China, India and other powers would be far more aggressive toward each other than they are now, for they all benefit from the secure sea lines of communication provided by the U. S. Navy and Air Force.”).

10. See, e.g., President Barack Obama, Remarks at the University of Queensland (Nov. 15, 2014) (transcript available at <https://www.whitehouse.gov/the-press-office/2014/11/15/remarks-president-obama-university-queensland> [<http://perma.cc/CW47-A6GM>]) (“[I]f, in fact, China is playing the role of a responsible actor that is peaceful and prosperous and stable, that is good for this region, it's good for the world, it's good for the United States.... [W]e are also encouraging China to adhere to the same rules as other nations . . . because America will continue to stand up for our interests and principles . . .”).
11. See e.g., Hillary Rodham Clinton, Sec'y State, Remarks With Chinese Foreign Minister Yang Jiechi (Sept. 5, 2012) (transcript available at <http://www.state.gov/secretary/20092013clinton/rm/2012/09/197343.htm> [<https://perma.cc/T2BF-U4CM>]) (Clinton, stating, “I reiterated, as I have on many occasions, the United States does not take a position on competing territorial claims.”).
12. See, e.g., Admiral Harry B. Harris, Jr., Statement Before the Senate Armed Service Committee on Maritime Security Strategy in the Asia-Pacific Region 17 (Sept. 17, 2015) (transcript available at <http://www.pacom.mil/Media/News/tabid/5693/Article/617677/statement-before-the-senate-armed-service-committee-on-maritime-security-strate.aspx> [<http://perma.cc/6XJC-MC5K>]) (stating that, “The United States does not take sides on issues of sovereignty with respect to these territorial disputes, but we do insist that all maritime claims be derived



more complex and assertive. Although declining to take sides in the sovereignty dispute between China and Japan, the U.S. affirmed and reaffirmed—including in statements by President Obama and Secretary of State Hillary Clinton—its interpretation of the U.S.-Japan security treaty as extending the U.S.'s commitments to defend the existing arrangement of Japanese administrative control over the Senkaku / Diaoyu.<sup>13</sup> This posture added another international legal dimension, inescapably casting the U.S.'s backing for Japan as an interpretation of an internationally lawful mutual security treaty.

The U.S. standpoint on sovereignty provided a basis for rejecting Beijing's assertions that the U.S. should not attempt to "internationalize" the "local" disputes in China's near seas, or "interfere" in a place where the U.S. had no territorial claims.<sup>14</sup> It also undergirded U.S. moves to convey support for Japan when Chinese vessels and aircraft challenged Japan's hitherto exclusive control over

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from naturally-formed land features in accordance with customary international law, as reflected in the Law of the Sea Convention" and that "[i]f one country selectively ignores these rules for its own benefit, others will undoubtedly follow, eroding the international legal system and destabilizing regional security and the prosperity of all Pacific states"); Prashanth Parameswaran, *US Not "Neutral" in South China Sea Disputes: Top US Diplomat*, DIPLOMAT (July 22, 2015), <http://thediplomat.com/2015/07/us-not-neutral-in-south-china-sea-disputes-top-us-diplomat/> [<http://perma.cc/56J9-KYLU>] (explaining that U.S. Assistant Secretary of State Daniel Russel "encouraged all actors – not just China – to cease actions that run contrary to [resolving disputes], including reclaiming land, building facilities and militarizing features"); Kristina Wong, *Defense Chief to Beijing: No 'Militarization' in the South China Sea*, HILL (Mar. 1, 2016), <http://thehill.com/policy/defense/271372-carter-warns-china-against-militarizing-the-south-china-sea> [<https://perma.cc/DFQ8-DC49>].

13. Ankit Panda, *Obama: Senkakus Covered Under US-Japan Security Treaty*, DIPLOMAT (Apr. 24, 2014), <http://thediplomat.com/2014/04/obama-senkakus-covered-under-us-japan-security-treaty/> [<http://perma.cc/33XU-FMSG>]; *Q&A: Japan's Yomiuri Shimbun Interviews President Obama*, WASH. POST (Apr. 23, 2014), [https://www.washingtonpost.com/world/qanda-japans-yomiuri-shimbun-interviews-president-obama/2014/04/23/d01bb5fc-cae3-11e3-95f7-7ecdde72d2ea\\_story.html](https://www.washingtonpost.com/world/qanda-japans-yomiuri-shimbun-interviews-president-obama/2014/04/23/d01bb5fc-cae3-11e3-95f7-7ecdde72d2ea_story.html) [<http://perma.cc/6V7V-8DB2>]; *Clinton: Senkakus Subject to Security Pact*, JAPAN TIMES (Sept. 25, 2010), <http://www.japantimes.co.jp/news/2010/09/25/news/clinton-senkakus-subject-to-security-pact/#.VrT3WzYrKRu> [<http://perma.cc/QUJ3-8Y2X>].
14. Zhang Yi, *China Firmly Opposes "US Interference"*, CHINA DAILY (June 1, 2015), [http://www.chinadaily.com.cn/china/2015-06/01/content\\_20870993.htm](http://www.chinadaily.com.cn/china/2015-06/01/content_20870993.htm) [<http://perma.cc/P3FE-PPD9>]; Edward Wong, *Beijing Warns U.S. About South China Sea Disputes*, N.Y. TIMES (June 22, 2011), [http://www.nytimes.com/2011/06/23/world/asia/23china.html?\\_r=0](http://www.nytimes.com/2011/06/23/world/asia/23china.html?_r=0) [<http://perma.cc/H4LB-G9QH>].



areas near the islands—ostensibly in response to the Japanese government's acquisition (derided in China as “nationalization”) of land in the islands owned by private Japanese citizens. When China acted, the U.S. sidestepped the sovereignty dispute and even-handedly urged all parties to refrain from escalation and the use of force and to obey international law, but left no doubt in Tokyo or Beijing about Washington's support for the status quo of Japanese control.<sup>15</sup>

The U.S.'s consistent eschewal of a position on territorial sovereignty has been conjoined with other law-related positions. Under Obama, the U.S. has called broadly on all parties to the South and East China Sea disputes to observe international law, and has emphasized support for two more specific and fundamental international legal principles in the South and East China Sea contexts: first, the rival claimants should handle their disputes peacefully; and, second, nothing should impede the rights of free passage of ships—including the U.S. navy—that the law of the sea confers in the high seas, international straits, and waters under the (limited) jurisdiction of coastal states.<sup>16</sup> Here too, the legal face of U.S. policy helped the U.S. to portray itself as the defender of status quo norms and as legitimately asserting collective international interests against a possible Chinese challenge. It perhaps served also to undercut the possible force of a pair of Chinese arguments: that China was itself adhering to international law (albeit under a different and very controversial view of law's content, as is discussed below);

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15. Justin McCurry & Tania Branigan, *Obama Says US Will Defend Japan in Island Dispute With China*, GUARDIAN (Apr. 24, 2014), <http://www.theguardian.com/world/2014/apr/24/obama-in-japan-backs-status-quo-in-island-dispute-with-china> [<http://perma.cc/U9F7-ABBX>]; Wu Xinbo, *America Should Step Back From the East China Sea Dispute*, N.Y. TIMES (Apr. 23, 2014), <http://www.nytimes.com/2014/04/24/opinion/america-should-step-back-from-the-east-china-sea-dispute.html> [<http://perma.cc/67K2-YWPF>].
  16. Hillary Clinton, Sec'y State, Discussing U.S.-Vietnam relations, the ASEAN Forum, and North Korea in Hanoi, Vietnam (July 23, 2010) (transcript available at <http://iipdigital.usembassy.gov/st/english/texttrans/2010/07/20100723164658su0.4912989.html#axzz3qT0pLkyY> [<http://perma.cc/6XQ3-D7ET>]); see also Daniel R. Russel, Assistant Sec'y, Bureau E. Asian & Pac. Affairs, Testimony before the House Committee on Foreign Affairs (Feb. 5, 2014) (transcript available at <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm> [<https://perma.cc/A9JJ-PU4X>]) (stating that U.S. taking “no position” on claims to sovereignty over disputed land features coexists with U.S. insistence that states forego “intimidation, coercion or force” and that “maritime claims must accord with customary international law,” and stating that “[i]n support of these principles...the United States continues to oppose claims that impinge on the rights, freedoms, and lawful uses of the sea”).

and that China had no intention of challenging the free transit of ships “in accordance with international law” (while leaving troubling ambiguity about whether China saw such restraint as legally obligatory rather than discretionary, or as extending to certain operations by U.S. military vessels that Beijing has often denounced as unlawful).<sup>17</sup>

Moves by China and its antagonists—and interpretations of Chinese behavior by U.S. observers<sup>18</sup>—helped the U.S. present its positions as legally principled, while also offering U.S. friends and allies in the region the strategic support that the Obama administration’s pivot promised. Although characterizations of the complex pattern of disputes in the South and East China Seas are themselves subject to dispute, versions that have gained traction in the U.S.—and that have been sharply rejected by China—depict China as the more disruptive actor and challenger to the status quo.<sup>19</sup> In these accounts, the principal moments of escalation in the conflict between China and the Philippines include: Chinese state ships stringing a net across the mouth of Scarborough Shoal in 2012 to deny Filipino fishing boats access to the long-disputed area and thereafter maintaining patrols to ward off Filipino ships;<sup>20</sup> Chinese

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17. Wang Yi on the South China Sea Issue At the ASEAN Regional Forum, MINISTRY FOREIGN AFF. CHINA (Aug. 6, 2015), available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1287277.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1287277.shtml) [<http://perma.cc/EPK6-D2Z6>]; Sarah Chan, *America Stirs Anti-China Fears in South China Sea*, WORLDMEETS.US (June 24, 2011), <http://worldmeets.us/globaltimes000069.shtml#axzz3zQ0MwMIK> [<http://perma.cc/GFA3-6M8A>]; *China urges U.S. not to undermine mutual trust*, XINHUA (Jan. 30, 2016, 9:56 PM), available at [http://news.xinhuanet.com/english/2016-01/30/c\\_135060127.htm](http://news.xinhuanet.com/english/2016-01/30/c_135060127.htm) [<https://perma.cc/7F94-LRUH>].
  18. See generally Jacques deLisle, *Troubled Waters: China's Claims and the South China Sea*, 56 ORBIS 608 (2012) (discussing the South China Sea and the grounds on which Beijing asserts rights to the disputed areas); Peter Dutton, *Three Disputes and Three Objectives China and South China Sea*, 64 NAVAL WAR COLL. REV. 42, 43-55 (2011) (providing a detailed critique of China's legal claims); James Kraska, *The Nine Ironies of the South China Sea Mess*, DIPLOMAT (Sept. 17, 2015), <http://thediplomat.com/2015/09/the-nine-ironies-of-the-south-china-sea-mess/> [<http://perma.cc/MSV4-CJHT>] (criticizing China's legal claims as unfounded and its behavior as crisis-provoking).
  19. deLisle, *supra* note 18; M Taylor Fravel, *China's Island Strategy: "Redefine the Status Quo"*, DIPLOMAT (Nov. 1, 2012), <http://thediplomat.com/2012/11/chinas-island-strategy-redefine-the-status-quo/> [<http://perma.cc/SLW3-5VB4>]; Kraska, *supra* note 18 (stating that “China’s policies have created a dangerous mess in the South China Sea”).
  20. Fravel, *supra* note 19; Jason Miks, *China, Philippines in Standoff*, DIPLOMAT (Apr. 11, 2012), <http://thediplomat.com/2012/04/china-philippines-in-standoff/> [<http://perma.cc/9UX5-739R>].

vessels' harassment of efforts to resupply the handful of Filipino servicemen stationed on the decrepit ship *Sierra Madre* grounded atop a disputed reef;<sup>21</sup> China's refusal to engage in the international arbitration proceeding—a venerable peaceful dispute resolution process under international law—that the Philippines initiated in 2013 and pursued in a way that steers clear of the territorial sovereignty and maritime boundary delimitation issues that are outside the scope of the tribunal's jurisdiction (partly because of the limited scope of China's submission to jurisdiction);<sup>22</sup> and indications in early 2016 that China might be preparing to undertake large-scale land-reclamation at Scarborough Shoal.<sup>23</sup>

For the East China Sea, prominent assessments in the U.S. view China as having engaged in retaliatory escalation against Japan in 2012 when it dispatched naval ships, state maritime service vessels, and non-state fishing boats to the Senkaku / Diaoyu area after Japanese Premier Noda's government acquired the privately owned land on the islands—a move that sought, according to accounts sympathetic to Japan, to avoid conflict by preventing purchase, and provocative use, of that land by ardent Japanese nationalists, led by

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21. Jeff Himmelman, *A Game of Shark and Minnows*, N.Y. TIMES (Oct. 27, 2013), <http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/> [<http://perma.cc/G464-XLND>]; Jane Perlez, *Philippines and China in Dispute Over Reef*, N.Y. TIMES (Mar. 31, 2014), [http://www.nytimes.com/2014/04/01/world/asia/beijing-and-manila-in-dispute-over-reef.html?\\_r=0](http://www.nytimes.com/2014/04/01/world/asia/beijing-and-manila-in-dispute-over-reef.html?_r=0) [<http://perma.cc/MLK3-KLNB>].
  22. *China Rejects Philippines' Arbitral Request: FM*, ENGLISH NEWS: CHINA (Feb. 19, 2013, 8:01 PM), [http://news.xinhuanet.com/english/china/2013-02/19/c\\_132178817.htm](http://news.xinhuanet.com/english/china/2013-02/19/c_132178817.htm) [<http://perma.cc/XXW7-B3G4>]; *China Rejects US Accusations of Provoking the Philippines in Maritime Dispute*, SOUTH CHINA MORNING POST: ASIA (Apr. 1, 2014, 11:16 PM), <http://www.scmp.com/news/asia/article/1462316/us-accuses-beijing-provoking-philippines-south-china-sea-dispute?page=all> [<http://perma.cc/PNY2-W53T>]; Ministry of Foreign Affairs, People's Republic of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (Dec. 7, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml) [<https://perma.cc/R5U2-P778>].
  23. David Brunnstrom and Andrea Shalal, *EXCLUSIVE-U.S. sees new Chinese activity around South China Sea shoal*, REUTERS (Mar 18, 2016 3:42 AM), available at <http://www.reuters.com/article/southchinasea-china-scarborough-update-idUSL2N16Q08M> [<https://perma.cc/V7BH-RPU5>] (quoting U.S. Navy Chief of Operations Admiral John Richardson, "I think we see some surface ship activity [by China near Scarborough Shoal, which is] an area of concern...a next possible area of reclamation.").

Tokyo Governor Ishihara.<sup>24</sup> This narrative of an assertive and status quo-threatening China was reinforced by Beijing's subsequent declaration, in November 2013, of an unusually restrictive air defense identification zone (ADIZ) over much of the East China Sea, including over the Senkaku islands.<sup>25</sup>

So too, when China, in 2014, temporarily deployed a massive oil exploration rig in waters near Vietnam's coast and small landforms claimed by China, and used water cannons to repel Vietnamese ships, the storyline that took hold in the U.S. portrayed China as the disturber of the status quo.<sup>26</sup> The same pattern recurred, in a much

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24. INT'L CRISIS GROUP, DANGEROUS WATERS: CHINA-JAPAN RELATIONS ON THE ROCKS 12-15, 23 (Apr. 8, 2013), <http://www.crisisgroup.org/~media/Files/asia/north-east-asia/245-dangerous-waters-china-japan-relations-on-the-rocks.pdf> [<http://perma.cc/VN87-RVPV>] (characterizing China's approach as "reactive assertiveness" and describing China's "incremental escalation" of the island dispute); Scott Cheney-Peters, *How Japan's Nationalization Move in the East China Sea Shaped the U.S. Rebalance*, NAT'L INTEREST (Oct. 26, 2014), <http://nationalinterest.org/feature/how-japans-nationalization-move-the-east-china-sea-shaped-11549?page=show> [<http://perma.cc/J849-W3BX>] (describing "Chinese decision to confront Japan" over Japan's decision to "nationalize" land in the islands as having "perhaps done more to shape the rebalance and the success of its implementation than any other actions").
25. *China Exclusive: Defense Ministry spokesman responds to air defense identification zone questions*, XINHUA (Nov. 23, 2013), available at [http://news.xinhuanet.com/english/china/2013-11/23/c\\_132912145.htm](http://news.xinhuanet.com/english/china/2013-11/23/c_132912145.htm) [<https://perma.cc/D3YS-TGDG>]; Jun Osawa, *China's ADIZ Over the East China Sea: A "Great Wall in the Sky"?*, BROOKINGS (Dec. 17, 2013), available at <http://www.brookings.edu/research/opinions/2013/12/17-china-air-defense-identification-zone-osawa> [<http://perma.cc/2YRN-UDZ7>].
26. Jen Psaki, State Dep't Spokesperson, Press Statement on Vietnam/China: Chinese Oil Rig Operations Near the Paracel Islands (May 7, 2014) (transcript available at <http://www.state.gov/r/pa/prs/ps/2014/05/225750.htm> [<https://perma.cc/JG3C-Y548>]) (characterizing oil rig deployment as "provocative" and "part of a broader pattern of Chinese behavior...that undermines peace and stability," and calling on all parties to address their claims "peacefully and in accordance with international law"); Ankit Panda, *China's HD-981 Oil Rig Returns, Near Disputed South China Sea Waters*, DIPLOMAT (June 27, 2015), <http://thediplomat.com/2015/06/chinas-hd-981-oil-rig-returns-to-disputed-south-china-sea-waters/> [<http://perma.cc/6CK2-HCCR>]; *China and Vietnam Clash Over Oil Rig in South China Sea as Tensions Escalate*, WASH. POST (May 7, 2014), [https://www.washingtonpost.com/world/asia\\_pacific/china-and-vietnam-clash-over-oil-rig-in-south-china-sea-as-tensions-escalate/2014/05/07/b936ed42-d5f7-11e3-95d3-3bcd77cd4e11\\_story.html](https://www.washingtonpost.com/world/asia_pacific/china-and-vietnam-clash-over-oil-rig-in-south-china-sea-as-tensions-escalate/2014/05/07/b936ed42-d5f7-11e3-95d3-3bcd77cd4e11_story.html) [<http://perma.cc/KV9N-ZHEF>].

stronger form after China began, in 2014, to undertake massive land reclamation projects at seven landforms and maritime features China controls in the South China Sea. U.S. government statements and Western media coverage have been highly critical of China's actions and have had little patience with Beijing's arguments that other claimant states had on other occasions undertaken land reclamation (although not recently or on so massive a scale), or that the purposes of China's island-building were limited to providing bases for maritime rescue, protection for fishing fleets, and other such benign purposes.<sup>27</sup>

Official statements from the Obama administration and inferences from Washington's support for China's rivals have entailed or implied the U.S.'s rejection of several specific Chinese claims that have been inconsistent with legal rules governing maritime rights and related security interests or, at least, interpretations of those rules that are widely shared internationally and are strongly backed by the United States. Although the U.S. has long called on China to clarify the nature of the claim associated with its famous "9-dash line" enclosing the vast bulk of the South China Sea, the issue sharpened during the Obama years.<sup>28</sup> China placed renewed emphasis on the 9-dash line—

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27. Edward Wong & Jonathan Ansfield, *To Bolster Its Claims, China Plants Islands in Disputed Waters*, N.Y. TIMES (June 16, 2014), <http://www.nytimes.com/2014/06/17/world/asia/spratly-archipelago-china-trying-to-bolster-its-claims-plants-islands-in-disputed-waters.html> [<http://perma.cc/T3QQ-NFH6>]; Daniel Russel, Assistant Sec'y, Bureau E. Asian & Pac. Affairs, U.S. Priorities in East Asia and the Pacific (Sep. 26, 2014) (transcript available at <http://fpc.state.gov/232135.htm> [<https://perma.cc/WCK9-M957>]) (stating U.S.'s emphasis on "importance of asserting and making and clarifying territorial claims in a way that's fully consistent with accepted international law" and noting that "the scale, scope and pace of China's reclamation work vastly exceeds that of others and is the source of clear anxiety and instability" in the region); Elizabeth Shim, *Ashton Carter: Beijing Should End Activities in South China Sea*, UPI (Sept. 16, 2015, 1:39 PM), [http://www.upi.com/Top\\_News/World-News/2015/09/16/Ashton-Carter-Beijing-should-end-activities-in-South-China-Sea/7451442423816/](http://www.upi.com/Top_News/World-News/2015/09/16/Ashton-Carter-Beijing-should-end-activities-in-South-China-Sea/7451442423816/) [<http://perma.cc/UAG5-HXLX>]; President Obama & President Xi of China, Remarks at a Joint Press Conference (Sept. 25, 2015, 12:22 PM) (transcript available at <https://www.whitehouse.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint> [<http://perma.cc/58ER-WC6U>]) (showing that Obama "conveyed . . . significant concerns over land reclamation, construction and the militarization of disputed areas.").
28. *U.S. Department of State Seeks to Clarify Meaning of China's 9-Dash Line*, GEOGARAGE BLOG (Feb. 22, 2016), available at <http://blog.geogarage.com/2016/02/us-department-of-state-seeks-to-clarify.html> [<https://perma.cc/4SPM-T2T2>] ("Washington has often called on Beijing to clarify her claims on the South China Sea, in an attempt to constrain them while avoiding a frontal clash"); Scott

especially in the context of China's opposition to claims filed by Malaysia, the Philippines, and Vietnam with the United Nations Commission on the Limits of the Continental Shelf—the international body that addresses delimitation of overlapping continental shelf zones.<sup>29</sup>

When the Obama administration included free international passage through the South China Sea among the U.S.'s three principal policies on the South China Sea, it implied a challenge to the legal validity of the strongest readings of China's frustratingly ambiguous 9-dash line claim.<sup>30</sup> The U.S. position was partly rooted in the view that China had no plausible legal claim that all the waters within the line were Chinese sovereign waters, akin to a territorial sea, or that the vast majority of those waters was part of a territorial sea ostensibly derived from baselines that—by the standards of U.S. and mainstream international views of relevant law—China had drawn too expansively around landforms that were too scattered, too small, and too unsettled in ownership to support such claims.<sup>31</sup>

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Marciel, Deputy Assistant Sec'y State, Statement Before the Senate Subcommittee on East Asian and Pacific Affairs (July 15, 2009) (transcript available at <http://www.state.gov/p/eap/rls/rm/2009/07/126076.htm> [<https://perma.cc/G2DH-RMQS>]); Robert Scher, Deputy Assistant Sec'y Defense, Statement Before the Senate Subcommittee on East Asian and Pacific Affairs 9,11 (July 15, 2009) (transcript available at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg53022/pdf/CHRG-111shrg53022.pdf> [<https://perma.cc/56U6-TWGB>]).

29. See People's Republic of China, Note Verbale to the Secretary General of the United Nations with regard to the joint submission made by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf, CML/17/2009 (May 7, 2009); see also People's Republic of China, Note Verbale to the Secretary General of the United Nations with regard to the Philippines' Note Verbale, No. 000228, CML/8/2011/ (Apr. 14, 2011); Gabriel Dominguez, *China's Nine-Dashed Line Has 'No Basis Under International Law'*, DW (July 27, 2015), <http://www.dw.com/en/chinas-nine-dashed-line-has-no-basis-under-international-law/a-18609290> [<http://perma.cc/BB4N-3PS8>] (describing Philippines arbitration claim and explaining that, "Vietnam, Malaysia, Brunei and Taiwan also challenge Chinese claims over most of the resource-rich sea.").
30. Jeffrey A. Bader, *The U.S. and China's Nine-Dash Line: Ending the Ambiguity*, BROOKINGS (Feb. 6, 2014), available at <http://www.brookings.edu/research/opinions/2014/02/06-us-china-nine-dash-line-bader> [<http://perma.cc/XJA4-PT4U>]; Daniel R. Russel, Assistant Sec'y, Bureau E. Asian & Pac. Affairs, Testimony before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific (Feb. 5, 2014) (transcript available at <http://www.state.gov/p/eap/rls/rm/2014/02/221293.htm> [<http://perma.cc/7CB4-56Z5>]).
31. See Office Ocean & Polar Affairs et al., *China: Maritime Claims in the South China Sea*, LIMITS IN SEAS Dec. 5, 2014, at 14-15,



Another of the U.S.'s core policy positions—that disputants (especially including China) must adhere to international law—swept somewhat more broadly and, again, cast China's positions as at odds with established legal norms. This policy, too, implied rejection of the “sovereign waters” claim that China had never definitively repudiated despite repeated U.S. calls. It also entailed a rebuff of the less radical—but still revisionist—and more recently emerging Chinese line of argument that the PRC has “historic rights” or “historic title” over the waters that are rooted in customary international law and that survived the advent of the United Nations Convention on the Law of the Sea (UNCLOS)-centered regime and the contemporary customary international law embodied in UNCLOS's substantive provisions.<sup>32</sup> Amid growing friction over the maritime disputes between Washington and Beijing in late 2014, the U.S. State Department's authoritative *Limits in the Seas* series issued an elaborate analysis that rejected the 9-dash line, including China's “historic” claims the area, as unsustainable under international legal rules governing maritime zones.<sup>33</sup>

The Obama administration's calls for freedom of navigation (and overflight) and adherence to international law framed other Chinese legal arguments and actions as at odds with existing principles of international law, specifically those concerning the limits of coastal states' rights to regulate activities in their exclusive economic zones (EEZ) or on the high seas. The U.S. rejected China's objections that U.S. practices of sending naval vessels and aircraft into areas near

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<http://www.state.gov/documents/organization/234936.pdf>  
[<http://perma.cc/UHW6-4DVQ>] (rejecting Chinese claim to the waters in the 9-dash line as inconsistent with international law); Office Ocean & Polar Affairs et al., *Straight Baselines Claim: China*, LIMITS IN SEAS, July 9, 1996, at 4-8,  
<http://www.state.gov/documents/organization/57692.pdf>  
[<https://perma.cc/84SF-NC67>] (rejecting China's straight baseline claims in South China Sea as inconsistent with international law); Sam LaGrone, *U.S. Destroyer Challenges More Chinese South China Sea Claims in New Freedom of Navigation Operation*, USNI NEWS (Jan. 30, 2016), <https://news.usni.org/2016/01/30/u-s-destroyer-challenges-more-chinese-south-china-sea-claims-in-new-freedom-of-navigation-operation> [https://perma.cc/7TLH-SHK7] (describing legal position underlying U.S. navigation operation in area where U.S. views Chinese baseline claims as excessive).

32. See Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107AM. SOC'Y INT'L L. 98, 99 (2013) (arguing that “historic title provides the basis for China's possession of certain historic rights in addition to the rights granted under UNCLOS”).
33. Office Ocean & Polar Affairs et al., *China: Maritime Claims in the South China Sea*, *supra* note 31, at 15-22 (analyzing and rejecting 9-dash line claim as “historic” claim under international law).



Chinese-claimed landforms were, variously, unauthorized maritime scientific research in China's EEZ, infringement of security rights of China in its EEZ, abuse of law-of-the-sea rights—including the expansive rights that states enjoy on the high seas—by showing a lack of due regard for China's rights and interests, or non-peaceful uses of the sea that threatened China's sovereign autonomy or territorial integrity or contravened other international legal limits.<sup>34</sup> Instead, the U.S.'s position—consistent with prevalent but contested (by China and others) understandings of international legal norms—continued to be that close-in surveillance and reconnaissance in China's EEZ were lawful acts, and that the U.S. Navy's presence and activities in the region did not violate international legal rules on peaceful use and respect for other states' rights.<sup>35</sup>

Many of these were long-standing points of disagreement that had surfaced dramatically in pre-Obama-administration incidents such as the collision of a Chinese air force jet with a U.S. Navy surveillance plane off the Chinese coast in the early days of the George W. Bush administration, and instances of Chinese navy ships harassing U.S. surveillance vessels in China's asserted EEZs.<sup>36</sup> But, the Obama-era

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34. Ronald O'Rourke, *Maritime Territorial and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress*, CONG. RESEARCH SERV. REPORT, Dec. 22, 2015, at 5-6, 11-14, <https://www.fas.org/sgp/crs/row/R42784.pdf>. [<http://perma.cc/8V83-EYMD>] (describing Chinese positions and the challenges they pose for U.S.); Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries*, CHINA MAR. STUDY, Dec. 2010, at 38-44, [https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7\\_Military-Activities-in-the-.pdf](https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7_Military-Activities-in-the-.pdf) [<http://perma.cc/B667-ULV7>] (explaining and supporting Chinese positions and China's rejection of U.S. positions); Peter Dutton, *Introduction*, CHINA MAR. STUDY, Dec. 2010, at 7-9, [https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7\\_Military-Activities-in-the-.pdf](https://www.usnwc.edu/Research---Gaming/China-Maritime-Studies-Institute/Publications/documents/China-Maritime-Study-7_Military-Activities-in-the-.pdf) [<http://perma.cc/B667-ULV7>] (describing conflicting legal views of U.S. and China).
35. O'Rourke, *supra* note 34, at 4, 29-32 (describing U.S. positions on legal issues maritime claims, operational rights, and rights to freedom of navigation in South China Sea); Dutton, *supra* note 34, at 7-10 (describing conflicting U.S. and Chinese legal views and relationship to U.S. maritime strategy and patrol activities in the South China Sea).
36. See generally Eric Donnelly, *The United States-China EP-3 Incident: Legality and Realpolitik*, 9 J. CONFLICT & SEC'Y 25 (2004); *Spokesman Zhu Bangzao Gives Full Account of Collision between U.S. and Chinese Military Planes* (Apr. 4, 2001), available at <http://www.china-un.ch/eng/premade/11437/spokesman040401.htm> [<https://perma.cc/6ZUY-BEW6>]; *U.S. Plane Grossly Violated International Law*, CHINA.ORG.CN (Apr. 4, 2001), available at <http://www.china.org.cn/english/2001/Apr/10074.htm> [<https://perma.cc/AMV3-DYY>].

pivot was accompanied by a reaffirmation of familiar positions and a new emphasis on these issues, as well as high-profile confrontations by Chinese vessels of U.S. Navy ships, including the USS John McCain and the USNS Impeccable in 2009 and the Impeccable again in 2013.<sup>37</sup> Initially framed by the perception that China was generally becoming more assertive in the region, the Obama administration's heightened emphasis on freedom of navigation for the U.S. Navy—and others—became more pointed in response to the specific issue of China's island-building project during the Obama presidency's final years.

The land reclamation program prompted more close-in approaches by U.S. ships and planes to counter China's claims of dominion and, in turn, stern warnings—based on inchoate and questionable claims of legal rights—from Chinese forces to steer clear (including in an instance famously recorded by a CNN news team on a fly-along on a U.S. military plane).<sup>38</sup> In October 2014, the U.S. Navy took a further step, sending a destroyer within twelve nautical miles of the recently augmented land forms, prompting a new round of Chinese official statements that PRC naval ships warned the U.S. ship “according to law” and claims that the U.S. was not acting in accordance with international law, including obligations not to abuse rights to freedom of navigation.<sup>39</sup> In January 2016, the U.S. Navy elicited a similar response from the PRC when it launched a “freedom of navigation operation” within twelve nautical miles of the disputed, PRC-controlled Paracel Islands—an area in which the U.S. has rejected China's straight baselines and related maritime claims as excessive

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37. See generally Raul Pedrozo, *Close Encounters at Sea: The USNS Impeccable Incident*, 62 U.S. NAVAL WAR COLL. REV.101-11 (2009); Ji Guoxing, *The Legality of the Impeccable Incident*, 5 CHINA SEC'Y 16-21 (2009); O'Rourke, *supra* note 34, at 12 (listing U.S.-China incidents at sea in last several years).
38. Jim Sciutto, *Behind the Scenes: A Secret Navy Flight over China's Military Build-Up*, CNN: POLITICS (May 26, 2015, 8:09 AM), <http://www.cnn.com/2015/05/26/politics/south-china-sea-navy-surveillance-plane-jim-sciutto/> [<http://perma.cc/SV2G-6SRC>]; *Flight of the Poseidon: New Navy Footage Released*, ASIA MAR. TRANSPARENCY INITIATIVE (May 21, 2015), available at <http://amti.csis.org/flight-of-the-poseidon-new-navy-footage-released/> [<http://perma.cc/K5U2-UAHC>].
39. Ben Blanchard & Andrea Shalal, *Angry China Shadows U.S. Warship Near Man-made Islands*, REUTERS (Oct. 28, 2015, 12:08 AM), available at <http://www.reuters.com/article/2015/10/28/us-southchinasea-usa-idUSKCN0SK2AC20151028#QKb4kSD1psavbd3W.97> [<http://perma.cc/FMH3-AY5Y>]; Jane Perlez, *U.S. Admiral, in Beijing, Defends Patrols in South China Sea*, N.Y. TIMES (Nov. 3, 2015), [http://www.nytimes.com/2015/11/04/world/asia/south-china-sea-navy-patrols-beijing.html?\\_r=0](http://www.nytimes.com/2015/11/04/world/asia/south-china-sea-navy-patrols-beijing.html?_r=0) [<https://perma.cc/GRF5-RSWG>].

and inconsistent with international law.<sup>40</sup> Implicit in the U.S.'s actions and explicit in U.S. statements was an insistence that the U.S. was exercising clear rights under established international law of the sea and was resisting apparent Chinese efforts to undermine or rewrite those rules.

When China declared its ADIZ over much of the East China Sea after the confrontation that followed the Japanese government's acquisition of privately owned land in the Senkaku / Diaoyu, the U.S. set forth its criticisms of China's moves as a defense of status quo legal norms.<sup>41</sup> Compared to other U.S. critiques of the legality of China's actions in the maritime domain, this was a somewhat awkward stance for the U.S., given the lack of a clear and solid foundation for ADIZs in international law, and the U.S.'s having pioneered the proclamation of ADIZs (and with Japan having preceded China in declaring an East China Sea ADIZ). Nonetheless, the Obama administration's critique—and other U.S. analyses—notably focused on how China claimed exceptionally broad rights to regulate, and potentially to limit, the use of airspace by foreign powers—claims of rights that the U.S. would not accept.<sup>42</sup> The U.S. therefore would not respect the notification requirements for U.S. military aircraft that China claimed authority to impose.

The same dynamic threatened to recur, in a more accentuated form, two years later when China responded to the U.S.'s and other states' pushback against Beijing's island-building with public

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40. LaGrone, *supra* note 31; *Full Statement of US Dept Defense on USS Curtis Wilbur's FONOP Past Triton Island* (Jan. 31, 2016), available at <https://seasresearch.wordpress.com/2016/01/31/full-statement-of-us-dept-defense-on-uss-curtis-wilburs-fonop-past-triton-island/> [<https://perma.cc/WKD3-27NP>]; *China urges U.S. not to undermine mutual trust*, *supra* note 17.
41. Chico Harlan, *China Creates New Air Defense Zone in East China Sea amid Dispute with Japan*, WASH. POST (Nov. 23, 2013), [https://www.washingtonpost.com/world/china-creates-new-air-defense-zone-in-east-china-sea-amid-dispute-with-japan/2013/11/23/c415f1a8-5416-11e3-9ee6-2580086d8254\\_story.html](https://www.washingtonpost.com/world/china-creates-new-air-defense-zone-in-east-china-sea-amid-dispute-with-japan/2013/11/23/c415f1a8-5416-11e3-9ee6-2580086d8254_story.html) [<https://perma.cc/9G4L-VC9M>].
42. Daniel R. Russel, Assistant Sec'y, Bureau E. Asian & Pac. Affairs, U.S. Policy in the East Asia and Pacific Region for 2014 (Feb. 4, 2014) (transcript available at <http://fpc.state.gov/220927.htm> [<https://perma.cc/MB65-CLRQ>]); Peter A. Dutton, Professor & Dir., China Mar. Studies Institute, Testimony before the House Foreign Affairs Committee: Hearing on China's Maritime Disputes in the East and South China Seas 8 (Jan. 14, 2014) (transcript available at <http://docs.house.gov/meetings/AS/AS28/20140114/101612/HHRG-113-AS28-Wstate-DuttonP-20140114.pdf> [<https://perma.cc/QUH3-RR2U>]).

discussion of a possible Chinese ADIZ over the South China Sea.<sup>43</sup> U.S. assessments tellingly and predictably warned that if China were to proclaim an ADIZ over regions so remote from its own substantial and undisputed territory, it would portend a more serious breach of—and challenge to—international norms, including legal ones.<sup>44</sup> Agreements on improved military contacts and incident-avoidance reached during Xi Jinping's September 2015 state visit and before may have reduced the risks of accidental incidents and escalation, but they did not close the gaps on these legal principles.<sup>45</sup>

As the foregoing indicates, while the Obama administration has presented the U.S. as a supporter and defender of established international legal norms when pursuing its strategic pivot to Asia, China has rejected implications or accusations that it is flouting international law. The PRC has insisted that its actions are supported by law (for example, giving China “indisputable” sovereignty over all of the contested landforms and related maritime rights, or “historic” rights over contested waters, or rights to limit U.S. navy operations

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43. Mira Rapp-Hooper, *China's Short-Term Victory In the South China Sea*, FOREIGN AFF. (Mar. 21, 2016), <https://www.foreignaffairs.com/articles/china/2016-03-21/chinas-short-term-victory-south-china-sea> [<https://perma.cc/X3NN-4ST9>].
44. Admiral Scott H. Swift, Commander, U.S. Pac. Fleet, Statement as delivered at the Royal Australian Navy Seapower Conference 5 (Oct. 6, 2015) (transcript available at <http://www.cpf.navy.mil/leaders/scott-swift/speeches/2015/10/ran-seapower-conference.pdf> [<https://perma.cc/2V78-33ZH>]); John Kerry, Sec'y of State, Remarks with Chinese Foreign Minister Wang Yi (Feb. 23, 2016) (transcript available at <http://www.state.gov/secretary/remarks/2016/02/253164.htm> [<https://perma.cc/P8PD-B6US>] (reiterating U.S. commitment to freedom of overflight and stressing that enforcement of maritime claims by deploying Chinese aircraft over disputed area are “not compatible” with that freedom); Li Bao & Si Yang, *Experts Worry China May Soon Establish South China Sea ADIZ*, VOICE AM. (July 29, 2015), <http://www.voanews.com/content/experts-concerned-china-may-soon-establish-southern-adiz/2882795.html> [<https://perma.cc/ZM5Y-G6DH>]. See Roncevert Almond, *Mandate of Heaven: An ADIZ in the South China Sea*, DIPLOMAT (July 20, 2015), <http://thediplomat.com/2015/07/mandate-of-heaven-an-adiz-in-the-south-china-sea/> [<https://perma.cc/QHM7-U96H>] (“A state's legal ability to administer and use force to secure its sovereign territory and accompanying airspace is much broader than the right to self-defense in international airspace or within an ADIZ.”).
45. See Mark J. Valencia, *US-China Military Agreements Dodge Deep Differences*, DIPLOMAT (Oct. 10, 2015), <http://thediplomat.com/2015/10/us-china-military-agreements-dodge-deep-differences/> [<https://perma.cc/XV7L-C3K6>] (stating, “[w]hether these agreements will make such encounters ‘safer’ remains to be seen. Meanwhile the root differences remain”).

off China's coast), or do not threaten interests that other states claim as legal rights (such as open sea lanes of communications in the South China Sea).<sup>46</sup>

International law on issues of territorial sovereignty, maritime rights, and other matters implicated in the China Seas disputes is in some respects ambiguous and potentially unstable. But, overall, the U.S. has been able to benefit from and support its pursuit of the goals associated with the Obama administration's pivot to Asia by having the better of the argument with China over whose positions are more consistent with established rules and interpretations of international law.

For China's maritime neighbors and rival claimants to the South and East China Sea areas, their interests have aligned with the U.S.'s strategic pivot and the stance the U.S. has taken on key international legal issues during the Obama administration. For those states and for the wider region (including China), the U.S.'s security commitments and the legal order that those commitments underpin have long served as public goods.<sup>47</sup> Crucial questions for the post-pivot and post-Obama years are whether the U.S. will sustain the capacity and the will to play its traditional roles in international security and related legal regimes in East Asia, and whether a more powerful China with more diverse and far-flung interests might become more supportive of the status quo or more willing to become a provider of international public goods in the region.

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46. *China's Indisputable Sovereignty over the Xisha and Nansha Islands*, FOREIGN MIN. CHINA (January 1980); *The Issue of the South China Sea*, FOREIGN MIN. CHINA (June 2000); H.E. Mr. Ban Ki-moon, Sec'y-Gen., U.N., Remarks in New York (May 7, 2009) (transcript available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf) [<https://perma.cc/5CQG-2DGA>]); *see generally* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE (Stefan Talmon & Bing Bing Jia eds., 2014) (setting forth, in great detail, pro-China positions; *see* Michael D. Swaine, *Chinese Views and Commentary on the East China Sea Air Defense Identification Zone*, CHINA LEADERSHIP MONITOR, Spring 2014, at 6 (explaining that "authoritative Chinese sources have sought to provide further clarifications on the nature and function of the ADIZ, emphasizing the conventional and non-threatening nature of the Chinese zone").
47. Sheila Smith, *The U.S.-Japan Alliance Upgrades and Maritime Contention in Asia*, ASIA MAR. TRANSPARENCY INITIATIVE (Apr. 30, 2015), *available at* <http://amti.csis.org/the-u-s-japan-alliance-upgrades-and-maritime-contention-in-asia/> [<https://perma.cc/JP7B-DAK4>]; James L. Schoff, *Strengthening U.S. Alliances in Northeast Asia*, CARNEGIE ENDOWMENT INT'L PEACE (July 16, 2015), *available at* <http://carnegieendowment.org/2015/07/16/strengthening-u.s.-alliances-in-northeast-asia/idhr> [<https://perma.cc/9WRK-V2FN>]; *see also* sources cited *supra* note 7.

## II. THE TRANS-PACIFIC PARTNERSHIP—INTEGRATION AND RIVALRY IN THE EAST ASIAN AND GLOBAL ECONOMY

Among the impetuses to the U.S.'s pursuit of the TPP was that the TPP would serve as the economic leg of the Obama administration's pivot, or rebalance, to Asia.<sup>48</sup> With its origins in proposals that predated the Obama administration, and after protracted negotiations that spanned the first several years of Obama's presidency, the TPP final agreement was reached by the U.S. and eleven other states (including Japan, Malaysia and Vietnam) on October 5, 2015 and signed by the U.S. on February 3, 2016.<sup>49</sup> The pact is massive; its charter members engage in one-third of world trade and produce 40% of global GDP.<sup>50</sup> It is also ambitious, with provisions addressing traditional trade issues, international investment, intellectual property, currency policy, and many aspects of domestic economic regulation, including labor rights and environmental protection.<sup>51</sup> With its original and likely expanding

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48. Jeffrey A. Bader & David Dollar, *Why the TPP is the Linchpin of the Asia Rebalance*, BROOKINGS (July 28, 2015, 8:00 AM), available at <http://www.brookings.edu/blogs/order-from-chaos/posts/2015/07/28-tpp-linchpin-asia-rebalance-bader-dollar> [https://perma.cc/D8RT-HKXP]; Ankit Panda, *Forging the Trans-Pacific Partnership: An Insider's Take*, DIPLOMAT (June 10, 2015), <http://thediplomat.com/2015/06/forging-the-trans-pacific-partnership-an-insiders-take/> [https://perma.cc/KL39-UY6F]; Mireya Solis, *The Geopolitical Importance of the Trans-Pacific Partnership*, BROOKINGS (Mar. 13, 2015, 12:25 PM), available at <http://www.brookings.edu/blogs/order-from-chaos/posts/2015/03/13-geopolitical-importance-transpacific-partnership> [https://perma.cc/KB9L-J2VG]; Bernard K. Gordon, *The Trans-Pacific Partnership and the Rise of China: What Japan Joining the TPP Means for the Region*, FOREIGN AFF. (Nov. 7, 2011), <https://www.foreignaffairs.com/articles/united-states/2011-11-07/trans-pacific-partnership-and-rise-china> [https://perma.cc/NH3U-4D3A].
49. See President Barack Obama, Statement by the President on the Trans-Pacific Partnership (Oct. 5, 2015) (transcript available at <https://www.whitehouse.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership> [https://perma.cc/8C99-QG6R]); Statement by the President on the Signing of the Trans-Pacific Partnership, WHITE HOUSE (Feb. 3, 2016), available at <https://www.whitehouse.gov/the-press-office/2016/02/03/statement-president-signing-trans-pacific-partnership> [https://perma.cc/USF3-6AMV]).
50. *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFF. U.S. TRADE REPRESENTATIVE, available at <https://ustr.gov/tpp/Summary-of-US-objectives> [https://perma.cc/CD7F-VYNV].
51. See generally Peter A. Petri et al., *The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment*, E.-WEST CTR. WORKING PAPERS: ECON. SERIES, Oct. 24, 2011, 8-9, 14-21 (discussing



membership in East Asia, the TPP promises to link the U.S. more closely to major economies in the region and thereby strengthen the U.S.'s economic presence and interests in the part of the world that Obama-era policies have identified as singularly important to the U.S.'s international interests, economic as well as geostrategic.

Along with earlier-established free-trade agreements with Korea and Singapore, the TPP provides an economic dimension to rebalancing that has offered reassurance to the U.S.'s allies and partners and others in the region that Washington's security commitments are durable.<sup>52</sup> Absent a robust economic component, the more prominent security side of the pivot would risk looking like a "sucker's bet" for the U.S.—and one that regional states could not count on the U.S. making over the long run. That is, the United States would be bearing the considerable costs of underwriting regional security, and it would be doing so with diminished resources and perhaps weakened will in the post-Iraq War and post-Global Financial Crisis era. Without the TPP and other arrangements to bolster economic ties between the U.S. and regional states, China would reap a more rapidly growing share of the economic benefits of East Asian stability and integration as the increasingly preeminent trade partner and fast-rising investment partner for most states in the region. TPP-deepened and TPP-strengthened economic ties between the U.S. and regional states promised to exert some counterforce to China's economic gravitational pull, and to bind the U.S. and East Asian states to the mast in their commitments to one another by giving them economic reasons to support the status quo in the region, including the U.S. security commitments that, while offensive to China, underpin that status quo.

As this suggests, the TPP, and the economic face of the pivot more generally, also have responded to China's rise as an economic power. That rise has been accompanied—and aided and reflected—by major regional trade agreement initiatives, including the ASEAN-China Free Trade Agreement, the Cross-Strait Economic Cooperation Framework Agreement (and numerous follow-on accords), the pursuit of free trade agreements with Korea and Japan, and a Regional Cooperative Economic Partnership (RCEP) that will include several

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TPP objectives and providing an inventory of issues covered); JEFFREY J. SCHOTT, ET AL., UNDERSTANDING THE TRANS-PACIFIC PARTNERSHIP 11-40 (2013) (discussing the TPP scope, and negotiations and their implications).

52. Jane Perlez, *U.S. Allies See Trans-Pacific Partnership as a Check on China*, N.Y. TIMES (Oct. 6, 2015) [hereinafter *U.S. Allies*], [http://www.nytimes.com/2015/10/07/world/asia/trans-pacific-partnership-china-australia.html?\\_r=0](http://www.nytimes.com/2015/10/07/world/asia/trans-pacific-partnership-china-australia.html?_r=0) [https://perma.cc/9SZX-X3AM]; Solis, *supra* note 48.



TPP members and rival the TPP in scale.<sup>53</sup> China's initiatives in the 2010s have gone beyond those centered on trade agreements. Beijing increasingly has sought to take a leading role in establishing new regional institutions with functions similar to those of the World Bank, the International Monetary Fund, and the Asian Development Bank. Prominent among these are the Shanghai-based Asian Infrastructure Investment Bank (AIIB), the BRICS-linked New Development Bank (NDB), and an International Monetary Fund (IMF)-like lending facility.<sup>54</sup>

In the TPP and related contexts, the Obama administration framed its agenda partly in legal terms and sought to depict its positions as supporting or fostering core legal—and broader—status quo norms for the international economy.<sup>55</sup> The TPP, after all, will be a legally binding international agreement that sets forth legal rules, many of which build on commitments member states have made in earlier trade agreements concerning their domestic laws governing foreign trade and investment. In pressing for the TPP, as with the security dimension of the pivot, the Obama administration asserted or implied contrasts between its generally status quo-supporting approach and China's agenda and behavior.

Yet, the Obama administration's claim to be defending the legal status quo has been on shakier ground with respect to the TPP and East Asian regional economic institutions than in the context of the issues related to international security in the South and East China Seas. In the areas addressed by the TPP, the relevant international legal norms and rules became unsettled before and during the Obama administration, and some of the goals that U.S. policy pursued were

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53. See generally *FTA News Release*, CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/english/index.shtml> [<https://perma.cc/LR74-CY8Z>] (supplying news releases discussing various updates and details regarding the trade agreements); *Give Play to China's Important Role and Accelerate RCEP Negotiations*, MINISTRY COM. CHINA (Sept. 1, 2014, 1:09 PM), <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201409/20140900720384.shtml> [<https://perma.cc/6NWC-PWPC>] (providing additional information about the trade agreements and the RCEP).

54. The significance of these institutional developments is discussed in greater detail later in this article.

55. See, e.g., *Summary of the Trans-Pacific Partnership Agreement*, OFF. U.S. TRADE REPRESENTATIVE (Oct. 2015), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> [<https://perma.cc/GS84-VS7T>] (summarizing content of TPP's 30 chapters, covering a wide range of trade-related legal issues and mandating conforming legal rules and characterizing the TPP as, in part, "updating traditional approaches to areas covered by previous free trade agreements").

not clearly or securely among the values or principles embedded in existing laws and related institutions.

The World Trade Organization (WTO) became the centerpiece of the international economic legal regime beginning in the early 1990s, when it succeeded—and extended into areas well beyond trade in manufactured goods—the original General Agreement on Tariffs and Trade, which had been the most significant (although institutionally weak) component of the postwar legal order for the international economy. The WTO was not, however, a significant feature in the Obama administration's quest for the TPP. This was largely due to the WTO's stark decline, following the collapse of the Doha Round negotiations, as the locus for liberalizing international trade, and the WTO's limitations in addressing many of the other international economic issues—such as intellectual property rights, investment regulation, and labor and environmental standards—that were on the U.S.'s agenda for the TPP.<sup>56</sup>

From early in the TPP negotiating process, it was relatively clear that the agreement would in some fundamental respects seek to further the values and extend the rules that were already embodied in the WTO and the WTO-centered regime for international economic law.<sup>57</sup> It is at least plausible to claim that this is the case with respect to further liberalizing trade in manufactured goods and agricultural products, enhancing market access, extending trade-facilitating rules more deeply into service sectors and the digital economy, improving transparency of trade-limiting rules and procedures, coordinating competition laws, limiting non-market behavior by state enterprises, reducing barriers to foreign investment (in part by adopting a “negative list” approach that provides for openness except in sectors specifically identified in host-country law), offering procedural protections for foreign investors (including dispute settlement through international arbitration) that should encourage international investment, providing robust protection for intellectual property, and restricting problematic domestic practices (including lax restrictions on pollution or protection of workers' rights) that can confer arguably

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56. Bryan Mercurio, *The WTO and Its Institutional Impediments*, 8 MELB. J. INT'L L. 198, 200-06 (2007); David Francis, *The U.S.-Asia Trade Deal Puts Dysfunction at the WTO on Full Display*, FP: CABLE (Oct. 7, 2015, 1:59 PM), <http://foreignpolicy.com/2015/10/07/the-u-s-asia-trade-deal-puts-dysfunction-at-the-wto-on-full-display/> [<https://perma.cc/K66G-A9PS>].

57. Much of the specific content of the TPP had remained unknown until late in the process because of the secrecy of the negotiating process and repeated delays in reaching a final agreement. Nonetheless, numerous leaks had revealed many of the key elements early on, and the final text largely confirmed expectations.

unfair competitive advantages.<sup>58</sup> Such features have underpinned the Obama administration's claim that the TPP is a "twenty-first century" trade agreement and that the TPP would give the U.S. a leading role in writing the rules for the international economy for the century ahead, much as the U.S. had shaped the economic and legal-economic regimes for the postwar world.<sup>59</sup>

But, as such forward-looking rhetoric implicitly concedes, writing new rules—even rules that are generally consistent with the principles or values embodied in existing rules—is not the same thing as defending or supporting the status quo legal order. The TPP is in tension with the WTO's core "most favored nation" principle (of equal treatment for all WTO member trading partners). In this respect, however, the TPP does not depart from the status quo. The WTO's aspiration for universal rules has long given way to extensive use—and not infrequent abuse—of provisions that allow preferential trade agreements among groups of WTO members.<sup>60</sup>

Many of the TPP terms that have been most divisive internationally and in the U.S. are controversial in part because they depart from existing international economic legal rules, including ones with roots in the WTO. For example, the Obama administration's drive for stronger protection for intellectual property rights has been a distinctively (if not uniquely) American aim, resisted by other parties

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58. See generally, *TPP Full Text*, OFF. U.S. TRADE REPRESENTATIVE, available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/X42L-G28Z>] (providing the provisions of the TPP in full).
59. Barack Obama, *My Turn: Trans-Pacific Partnership is Better than Past Trade Deals*, POL. MONITOR (Oct. 17, 2015), <https://politics.concordmonitor.com/2015/10/opinion/my-turn-trans-pacific-partnership-is-better-than-past-trade-deals/> [[perma.cc/6D9A-M7PH](https://perma.cc/6D9A-M7PH)]; Jeffrey Zients, *Bringing Trade Agreements into the 21<sup>st</sup> Century*, WHITE HOUSE (APR. 16, 2015, 6:20 PM), available at <https://www.whitehouse.gov/blog/2015/04/16/bringing-trade-agreements-21st-century> [<https://perma.cc/Z6UT-EMLA>]; Barack Obama, *Here's the Deal: The Text of the Trans-Pacific Partnership*, MEDIUM (Nov. 5, 2013), <https://medium.com/the-trans-pacific-partnership/here-s-the-deal-the-text-of-the-trans-pacific-partnership-103adc324500#.klt37ir24> [<https://perma.cc/NV9W-UZQF>].
60. See generally, *Regionalism: Friends or Rivals?*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm) [<https://perma.cc/5UK4-PNQU>] (discussing the developments of the regional trade groups); Sydney M. Cone, III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and "Imperial Preference"*, 26 MICH. J. INT'L. L. 563, 563 (2005) (examining the creation of free-trade areas and their "exceptions to the basic WTO principle of most-favored-nation (MFN) treatment").

and potential parties to trade agreements.<sup>61</sup> So too, Obama administration-supported TPP provisions—specifically, the Investor-State Dispute Settlement (ISDS) process—that would allow international arbitral bodies to hear challenges to a state's legal rules have drawn fire from the left (for favoring multinational companies) and from the left and right (for undermining American sovereignty by subjecting U.S. laws to challenge in non-U.S. tribunals).<sup>62</sup> Much the same can be said about the long-incompletely-disclosed and highly contentious sections concerning environmental<sup>63</sup> and labor rights<sup>64</sup>

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61. See generally Laurence R. Helfer, *Regime-Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE INT'L L. J. 1, 1-2, 23-25 (2004) (discussing growing “[c]hallenges to existing methods of international intellectual property lawmaking” and developing country concerns with U.S. and European Community agendas); Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. R. 105, 109-18 (2012) (noting the concerns raised regarding intellectual property provisions by the secrecy of the TPP negotiating text and setting TPP against the back drop of prior international opposition to U.S.-led efforts to expand intellectual property protection under TRIPS).
62. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html) [<https://perma.cc/38TV-SU3C>]; Celeste Drake, *TPP Daily Debunk #1: The ‘Most Progressive Trade Agreement Ever,’* AFL-CIO NOW (Nov. 10, 2015), <http://www.aflcio.org/Blog/Political-Action-Legislation/TPP-Daily-Debunk-1-The-Most-Progressive-Trade-Agreement-Ever> [<https://perma.cc/QVR5-X8CH>]; Alan Morrison, *Is the Trans-Pacific Partnership Unconstitutional?*, ATLANTIC (June 23, 2015), <http://www.theatlantic.com/politics/archive/2015/06/tpp-isds-constitution/396389/> [<https://perma.cc/TV9E-J976>]; Daniel J. Ikenson, *A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement*, CATO INSTITUTE (Mar. 4, 2014), available at <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state>, [<https://perma.cc/4BRD-METM>]; William Mauldin, *Dispute-Resolution System Fuels Criticism of Pacific Trade Pact*, WALL ST. J. (Mar. 2, 2015, 5:08 PM), <http://www.wsj.com/articles/dispute-resolution-system-fuels-criticism-of-pacific-trade-pact-1425330853> [<https://perma.cc/V88P-W2ND>]; see also *Sessions on TPP: ‘My Fears Confirmed’; Shut Off Fast-Track Now*, JEFF SESSIONS SENATE WEBPAGE (Nov. 5, 2015), <http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=711D14A5-8B65-4E4B-AAE1-7DCAA93EE60B> [<https://perma.cc/U3HV-9D54>](stating that the TPP “puts those who make the rules out of reach of those who live under them, empowering unelected regulators” from other countries).
63. Michael Brune, *Congress Should Oppose the TPP on Environmental Grounds*, N.Y. TIMES (Oct. 7, 2015, 7:58 AM), <http://www.nytimes.com/roomfordebate/2015/10/06/the-future-of->

protection, with U.S. critics on the left worried that new international legal rules will offer standards or enforcement mechanisms that are too weak, and U.S. critics on the right concerned that the Obama administration might use TPP commitments to increase regulatory burdens and costs for U.S. industry. On both sides, the concern is not about international legal stasis but about international legal change.

Along with this mix of status quo-supporting, norm-extending, and rule-revising aims, the Obama administration's pursuit of the TPP, including its distinctly legal elements, has entailed rivalry with China and has included efforts to portray China's aims as in tension with existing or evolving international legal norms.<sup>65</sup> When the U.S.

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- trans-pacific-trade/congress-should-oppose-tpp-on-environmental-grounds [https://perma.cc/3ZLV-Y9TD]; Brian Clark Howard, *4 Ways Green Groups Say Trans-Pacific Partnership Will Hurt Environment*, NAT'L GEOGRAPHIC (Jan. 18, 2014), <http://news.nationalgeographic.com/news/2014/01/140117-trans-pacific-partnership-free-trade-environment-obama/> [https://perma.cc/BXU5-KSP4]; *Trans-Pacific Partnership Falls Short for Wildlife*, DEFENDERS OF WILDLIFE (Nov. 5, 2015), available at <https://www.defenders.org/press-release/trans-pacific-partnership-falls-short-wildlife> [https://perma.cc/2Q8L-PEYU]; *The Trans-Pacific Partnership Deserves a Hearing*, NAT'L REV. (Apr. 20, 2015 4:00 AM), <http://www.nationalreview.com/article/417161/trans-pacific-partnership-deserves-hearing-editors> [https://perma.cc/784U-H968]; *The United States and Environmental Protections in the TPP*, TRADEWINDS (Jan. 2014), available at <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/January/The-US-and-Environmental-Protections-in-the-TPP> [https://perma.cc/H3BM-HPST].
64. *Trans-Pacific Partnership: Labor Rights*, AFL-CIO, available at <http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP> [https://perma.cc/76ZV-GZMH]; John Nichols, *Why So Many Democrats Rejected Obama's Lobbying on the Trans-Pacific Trade Deal*, NATION (May 11, 2015), <http://www.thenation.com/article/why-so-many-democrats-rejected-obamas-lobbying-trans-pacific-trade-deal/> [https://perma.cc/6VXX-ZYS5]; United Auto Workers Leadership Statement of Opposition to the TPP, UNITED AUTO WORKERS (Dec. 3, 2015), available at <http://uaw.org/united-auto-workers-leadership-statement-of-opposition-to-the-tpp-statement-from-uaw-president-williams/> [https://perma.cc/8UTJ-M223]; Daniel Horowitz, *The Big Questions about Trade Promotion Authority*, CONSERVATIVE REV. (Apr. 23, 2015), available at <https://www.conservativereview.com/commentary/2015/04/the-big-questions-about-trade-promotion-authority> [https://perma.cc/7MMS-7ZTB].
65. See, e.g., David Nakamura, *Obama at APEC Summit: 'China Must Play by the Rules*, WASH. POST (Nov. 12, 2011), [https://www.washingtonpost.com/world/obama-at-apec-summit-china-must-play-by-the-rules/2011/11/12/gIQALRu2FN\\_story.html](https://www.washingtonpost.com/world/obama-at-apec-summit-china-must-play-by-the-rules/2011/11/12/gIQALRu2FN_story.html) [https://perma.cc/JQ24-T9CG] (explaining that President Obama

began to pursue the TPP in earnest under Obama, PRC observers characterized it—not without reason—as an “ABC” (“anyone but China”) pact.<sup>66</sup> In its drive for congressional support for the “fast track” trade promotion authority (TPA) that long has been essential for U.S. presidents to achieve trade agreements, the Obama administration strikingly emphasized rivalry with China, specifically in terms of assuring that the U.S., not China, will “write the rules” for the Asian and global economies.<sup>67</sup> Even with TPA and a freshly completed TPP agreement in hand (but still facing opposition in Congress in a future up-or-down vote on the pact), Obama reprised this theme, declaring the TPP essential to avoiding an outcome in which “competitors that don’t share our values, like China, will write the rules for the global economy.”<sup>68</sup> The President reiterated this

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“warn[ed] China that it must ‘play by the rules’ as its international influence increases”).

66. See, e.g., Guoyu Song & Wen Jin Yuan, *China's Free Trade Agreement Strategies*, WASH. Q., Fall 2012, at 110 (explaining that, “most Chinese scholars claim its successful implementation will have a negative impact on China”); Mei Xinyu, *TPP No Better than ‘Imperial Preference’*, CHINA DAILY (Oct. 12, 2015, 7:34 PM), [http://usa.chinadaily.com.cn/opinion/2015-10/12/content\\_22159826.htm](http://usa.chinadaily.com.cn/opinion/2015-10/12/content_22159826.htm) [https://perma.cc/JQ24-T9CG] (“Be it launching the negotiations on the TPP, or reaching agreement on the Transatlantic Trade and Investment Partnership with Europe, all the US’ moves have the intention of maintaining its hegemony in international trade rulemaking while excluding China.”); Elizabeth Shim, *China's Exclusion from Trans-Pacific Partnership Provokes Reactions*, UPI, (Oct. 6, 2015, 1:29 PM), [http://www.upi.com/Top\\_News/World-News/2015/10/06/Chinas-exclusion-from-Trans-Pacific-Partnership-provokes-reactions/7151444150517/](http://www.upi.com/Top_News/World-News/2015/10/06/Chinas-exclusion-from-Trans-Pacific-Partnership-provokes-reactions/7151444150517/) [https://perma.cc/UT7W-8MUM] (“China’s exclusion from the finalized Trans-Pacific Partnership has provoked a range of responses from the world’s second-largest economy, and an analyst said the deal is driven by political motivations to encircle China.”).
67. See Tanya Somander, *President Obama: “Writing the Rules for 21<sup>st</sup> Century Trade”*, WHITE HOUSE (Feb. 18, 2015, 3:01 PM), available at <https://www.whitehouse.gov/blog/2015/02/18/president-obama-writing-rules-21st-century-trade> [https://perma.cc/WA5C-T5CD] (“[W]e have to make sure the United States -- and not countries like China -- is the one writing this century’s rules for the world’s economy”); President Barack Obama, Remarks by the President in State of the Union Address (Jan. 20, 2015, 9:10 PM) (transcript available at <https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [https://perma.cc/P3K6-L4T9]) (“But as we speak, China wants to write the rules for the world’s fastest-growing region”).
68. Off. Press Sec’y, Weekly Address: Writing the Rules for a Global Economy (Oct. 10, 2015) (transcript available at



point, nearly verbatim, in his final State of the Union address and in his statement on signing the TPP.<sup>69</sup>

The Obama administration often moderated its tone concerning China and the TPP, declaring that the TPP was open to all who could satisfy its relatively exacting standards—something that China was far from achieving.<sup>70</sup> China softened its position as well, indicating that it was potentially interested in eventual accession.<sup>71</sup> Even amid such less confrontational stances, however, the international law-related point remained the same: the TPP was a demanding treaty that was a qualitative step forward for established international norms of trade liberalization, and that remained beyond China's capacity and will. U.S. official and mainstream sources contrasted the TPP as a “high quality” trade-plus accord with the China-centered RCEP, which limited itself more narrowly to trade issues, imposed weaker overall obligations, and permitted greater variance among the obligations of members. Such traits were familiar from the much-criticized “spaghetti bowl” or “noodle bowl” of

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<https://www.whitehouse.gov/the-press-office/2015/10/10/weekly-address-writing-rules-global-economy> [<https://perma.cc/P3K6-L4T9>].

69. President Barack Obama, State of the Union Address as Delivered (Jan. 13, 2016) (transcript available at <https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address> [<https://perma.cc/A7XU-BZWG>]) (“With TPP, China does not set the rules in that region; we do. You want to show our strength in this new century? Approve this agreement.”); Statement on the TPP, *supra* note 49 (“TPP allows America – and not countries like China – to write the rules of the road in the 21st century, which is especially important in a region as dynamic as the Asia-Pacific”).
70. Kai Ryssdal, *President Obama Says China Open to Joining Trade Partnership—Transcript*, MARKETPLACE (June 3, 2015, 9:53 AM), available at <http://www.marketplace.org/2015/06/03/world/president-obama-talks-trade/president-obama-says-china-open-joining-trade-partnership> [<https://perma.cc/92A4-5YPN>].
71. *China Communist Party Paper Says Country Should Join U.S.-led Trade Pact*, REUTERS (Oct. 24, 2015, 11:08 PM), available at <http://www.reuters.com/article/us-china-trade-tpp-idUSKCN0SJ01X20151025> [<https://perma.cc/4CNT-JKFR>]; *China Weighing up TPP, says commerce ministry*, XINHUA (Feb. 4, 2016), available at [http://news.xinhuanet.com/english/2016-02/04/c\\_135074386.htm](http://news.xinhuanet.com/english/2016-02/04/c_135074386.htm) [<https://perma.cc/954Y-NEQH>]; Keith Bradsher, *Once Concerned, China is Quiet about Trans-Pacific Trade Deal*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/2015/04/29/business/international/once-concerned-china-is-quiet-about-trans-pacific-trade-deal.html> [<https://perma.cc/LN5N-MDYM>]; Barry Naughton et al., *What Will the TPP Mean for China?*, CHINA FILE (Oct. 6, 2015), available at <http://www.chinafile.com/conversation/what-will-tpp-mean-china> [<https://perma.cc/2XQR-BFEU>].



overlapping and diverse trade pacts that were prevalent in Southeast Asia.<sup>72</sup>

The Obama administration's partly self-proclaimed competition with China over the legal and law-related institutions of the international economy, and its efforts to present the U.S. as supporting established law or the further development of the legal norms embodied in the existing order, extends beyond trade pacts. The Obama administration, along with like-minded critics, cast the AIIB and other new PRC-backed international institutions as potential threats to venerable organs of the international economic-legal order, including the World Bank and the IMF.<sup>73</sup> The Obama administration strove, with strikingly little success, to dissuade U.S. friends and allies from joining the AIIB.<sup>74</sup> A rare exception to the

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72. Ben Rhodes, White House Deputy Nat'l Sec. Adviser Strategic Commc'n, White House Briefing on President Obama's Trip to Asia Pacific (Nov. 23, 2011, 3:00 PM) (transcript available at <http://iipdigital.usembassy.gov/st/english/texttrans/2011/11/20111123120030su0.9150769.html#axzz3zsjl8AnN> [<https://perma.cc/TK4G-73A7>]); Derek Scissors, *What a Good Trans-Pacific Partnership Looks Like*, HERITAGE FOUND. (Mar. 8, 2013), *available at* <http://www.heritage.org/research/reports/2013/03/what-a-good-trans-pacific-partnership-looks-like> [<https://perma.cc/8CNX-GYA6>]; Amb. Alan Wm. Wolff on behalf of the National Foreign Trade Council, Testimony before the International Trade Commission 8 (Jan 23, 2016) (transcript available at [https://www.usitc.gov/press\\_room/documents/testimony/105\\_001\\_004.pdf](https://www.usitc.gov/press_room/documents/testimony/105_001_004.pdf) [<https://perma.cc/RGK9-GEXE>]); Gordon G. Chang, *TPP vs. RCEP: America and China Battle for Control of Pacific Trade*, NAT'L INTEREST (Oct. 6, 2015), <http://nationalinterest.org/feature/tpp-vs-rcep-america-china-battle-control-pacific-trade-14021> [<https://perma.cc/54TC-GMAK>]; Sanchita Basu Das, *RCEP and TPP: Comparisons and Concerns*, ISEAS PERSPECTIVE, Jan. 7, 2013, at 5-6, [http://www.waseda.jp/gsaps/eaui/educational\\_program/PDF\\_2/TU\\_PRASIRTSUK,%20Kitti\\_Reading1\\_RCEP%20and%20TPP%20Comparisons%20and%20Concerns.pdf](http://www.waseda.jp/gsaps/eaui/educational_program/PDF_2/TU_PRASIRTSUK,%20Kitti_Reading1_RCEP%20and%20TPP%20Comparisons%20and%20Concerns.pdf) [<https://perma.cc/LDV3-MZ5P>].
73. TOBIAS HARRIS ET AL., ASIAN INFRASTRUCTURE INVESTMENT BANK: CHINA AS A RESPONSIBLE STAKEHOLDER? 45-46 (Daniel Bob ed., 2015); Jack Lew, Sec'y Treasury, Remarks of Secretary Lew at the Asia Society Northern California on the International Economic Architecture and the Importance of Aiming High (Mar. 31, 2015) (transcript available at <http://www.treasury.gov/press-center/press-releases/Pages/jl10014.aspx> [<https://perma.cc/Q88K-XTVG>]); Rebecca Liao, *Out of the Bretton Woods: How the AIIB is Different*, FOREIGN AFF. (July 27, 2015), <https://www.foreignaffairs.com/articles/asia/2015-07-27/out-bretton-woods> [<https://perma.cc/S8SP-85X5>]; Jane Perlez, *China Creates a World Bank of Its Own and the U.S. Balks*, N.Y. TIMES (Dec. 4, 2015), [http://www.nytimes.com/2015/12/05/business/international/china-creates-an-asian-bank-as-the-us-stands-alooft.html?\\_r=0](http://www.nytimes.com/2015/12/05/business/international/china-creates-an-asian-bank-as-the-us-stands-alooft.html?_r=0) [<https://perma.cc/P7FW-K5XK>].
74. Jane Perlez, *U.S. Opposing China's Answer to World Bank*, N.Y. TIMES (Oct. 9, 2014) [hereinafter *U.S. Opposing China's Answer*],

pattern of Washington's failure was Japan, which has been a pivotal member of the Asian Development Bank—the entity perhaps most immediately in potential competition with the AIIB.

Although political and economic calculations do much to explain the rush by many states in East Asia and the developed world to join the AIIB and to reject Washington's entreaties, the Obama administration's inability to claim credibly that it was defending a robust status quo in international economic law did not help the U.S.'s case. Beijing strongly insisted that it was not challenging status quo norms. The PRC explained that it was offering the AIIB and other institutional initiatives as supplements to existing entities, not as substitutes for them or competitors to them. Chinese sources explained that much of the lending from the new bodies would be based on the standards established by existing institutions under rules already in place.<sup>75</sup> In a particularly sharp poke at the U.S.'s case, Beijing asserted that its moves were made necessary by the failure—largely attributable to the U.S.'s congressionally-induced inability to move forward—to reform the IMF and the World Bank to realign those institutions with new realities.<sup>76</sup> Those realities principally included the greatly increased economic importance of China, India, and other large emerging economies, and the greatly increased need to

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[http://www.nytimes.com/2014/10/10/world/asia/chinas-plan-for-regional-development-bank-runs-into-us-opposition.html?\\_r=0](http://www.nytimes.com/2014/10/10/world/asia/chinas-plan-for-regional-development-bank-runs-into-us-opposition.html?_r=0) [<https://perma.cc/7DQD-9GKE>]; Jane Perlez, *Stampede to Join China's Development Bank Stuns Even Its Founder*, N.Y. TIMES (Apr. 2, 2015) [hereinafter *Stampede to Join China's Development Bank*], <http://www.nytimes.com/2015/04/03/world/asia/china-asian-infrastructure-investment-bank.html> [<https://perma.cc/JF4N-4QDN>].

75. John Kerry, Sec'y State, Joint Press Availability with Chinese Foreign Minister Wang Yi (May 16, 2015) (transcript available at <http://www.state.gov/secretary/remarks/2015/05/242497.htm> [<https://perma.cc/NH7G-CPGA>]) (Chinese Foreign Minister stating AIIB “will be observing international rules” and is “ready to carry out cooperation” with the World Bank and the Asian Development Bank); *Full Text of Chinese President Xi Jinping's Address at AIIB Inauguration Ceremony*, CHINA DAILY (Jan. 16, 2016), [http://www.chinadaily.com.cn/business/2016-01/16/content\\_23116718\\_3.htm](http://www.chinadaily.com.cn/business/2016-01/16/content_23116718_3.htm) [<https://perma.cc/PB6N-HT4Q>] (stating that the AIIB would be “a truly international, rule-based and high-standard institution that would “complement” existing development banks); Hua Shengdun, *World Bank, IMF: Will Work with AIIB*, CHINA DAILY (Apr. 17, 2015, 11:43 AM), [http://www.chinadaily.com.cn/world/2015-04/17/content\\_20457537.htm](http://www.chinadaily.com.cn/world/2015-04/17/content_20457537.htm) [<https://perma.cc/E8U9-9V29>].
76. *China Expresses Regret at U.S. Failure to Pass IMF Reforms*, REUTERS (Dec. 12, 2014), available at <http://www.reuters.com/article/us-china-usa-imf-idUSKBN0JQ0PO20141212> [<https://perma.cc/3G6J-RSHH>] (quoting Chinese Foreign Ministry Spokesperson Hong Lei); *U.S. Opposing China's Answer*, *supra* note 76.

mobilize much greater resources if the World Bank and IMF were to perform their functions adequately in a global economy with vast infrastructure needs and many countries at risk for balance of payment difficulties.<sup>77</sup>

So too, China has been able to parry U.S. critiques of China's international economic and legal-economic initiatives, thanks in part to the Obama administration's resort to China-excluding rhetoric when it was cultivating domestic support for the TPP.<sup>78</sup> China's case—and rebuttal of the U.S.'s case—also benefited from Beijing's ability to present the RCEP, in comparison to the TPP, as an equally lawful and not innately rivalrous regional economic agreement that advances (albeit somewhat modestly) widely accepted international norms of trade liberalization and international economic integration.<sup>79</sup>

The interests and preferences of East Asian states (most of which are members or potential members of the TPP, the RCEP, or both) have generated complex and ambivalent stances toward the Obama administration's agenda on regional economic issues and their legal aspects. Many states in the region have reacted positively. They have endorsed parts of the U.S.'s agenda. They have pursued the TPP as a legal framework for promoting trade, investment and economic integration. They have welcomed the opportunity to balance their growing economic dependence on China with more ties to the United States. They have taken comfort in the U.S.'s signal of an economic

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77. *Interview: AIIB has Opportunity to Establish Right Standards for Multilateral Development Banks: Expert*, NEW CHINA (June 30, 2015), [http://news.xinhuanet.com/english/2015-06/30/c\\_134366519.htm](http://news.xinhuanet.com/english/2015-06/30/c_134366519.htm) [<https://perma.cc/3RWM-D8TS>]; Dingding Chen, *3 Reasons the BRICS' New Development Bank Matters*, DIPLOMAT (July 23, 2014), <http://thediplomat.com/2014/07/3-reasons-the-brics-new-development-bank-matters/> [<https://perma.cc/Q7KQ-F24H>]; *\$100bn BRICS Monetary Fund to be Operational in 30 Days*, BRICS POST (July 1, 2015, 8:02 AM), [http://thebricspost.com/100bn-brics-monetary-fund-to-be-operational-in-30-days/#.VhiZe\\_lVhBc](http://thebricspost.com/100bn-brics-monetary-fund-to-be-operational-in-30-days/#.VhiZe_lVhBc) [<https://perma.cc/W3HW-XRJ5>].
78. As with the TPP, the Obama administration backed off its initial criticism in the context of the AIIB, indicating (in an echo of its shift toward welcoming China's potential eventual membership in the TPP) that that the U.S. was prepared to cooperate with the AIIB, provided it observed "best practices." Ian Talley, *Obama: We're All for the Asian Infrastructure Investment Bank*, WALL ST. J. (Apr. 28, 2015, 3:56 PM), <http://blogs.wsj.com/economics/2015/04/28/obama-were-all-for-the-asian-infrastructure-investment-bank/> [<https://perma.cc/Y8P4-7ZH3>].
79. *See, e.g., Transcript: Li Keqiang*, FIN. TIMES (Apr. 15, 2015, 1:46 PM), <http://www.ft.com/intl/cms/s/0/3a42d156-e288-11e4-aa1d-00144feab7de.html> [<https://perma.cc/V3VT-9N9W>] (providing an interview with Chinese Premier Li Keqiang, stating that RCEP and other regional FTAs including the TPP and ASEAN-China FTA "can all work in parallel" and calling for "full compliance with the WTO").

commitment to complement and reinforce its security commitment to the region.<sup>80</sup> Yet, these states have not wanted closer economic and related legal ties with the United States to undermine their economic relations with China, which have offered considerable benefits as well, and which could be expected to grow with China's continued economic rise and the new opportunities offered by China's RCEP, AIIB, and other economic initiatives and associated legal frameworks and institutional structures.

As the Obama years near their end, fundamental questions remain unanswered. They include the prospects for congressional passage of—and public reaction to—the just-completed and still-controversial TPP.<sup>81</sup> Assuming Congress eventually approves the TPP (and even if it does not), U.S. policy in the post-Obama period will have to grapple with uncertainty about where along the spectrum from complementarity to systemic conflict will lie the relationships between the TPP and long-standing institutions such as the IMF, the World Bank, and the ADB, on one side, and the RCEP, and other emerging, more Chinese-influenced entities such as the AIIB and the NDB, as well as China's "one belt, one road" policy (for developing overland and maritime transportation infrastructure to link China southward and westward all the way to Europe), on the other.

### III. AFTER OBAMA AND UNDER A 'NEW NORMAL'?

As the Obama administration enters its final months, many of the unanswered questions about the legacy of the pivot—including the response to still-evolving security challenges in the South and East

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80. *U.S. Allies*, *supra* note 54; Michael Wesley, *Trade Agreements and Strategic Rivalry in Asia*, 69 AUSTL. J. INT'L AFF. 479, 482 (2015); *see* President Obama & Prime Minister Abe, Remarks by President Obama and Prime Minister Abe in Joint Press Conference (Apr. 28, 2015, 12:10 PM) (transcript available at <https://www.whitehouse.gov/the-press-office/2015/04/28/remarks-president-obama-and-prime-minister-abe-japan-joint-press-confere> [<https://perma.cc/V93T-ZK8E>]) (Prime Minister Abe discussing the TPP and its benefits).
81. President Obama has stated that he remains "cautiously optimistic" about TPP's prospects for passage in Congress. President Barack Obama, Remarks by the President at National Governors Association Reception (Feb. 22, 2016) (transcript available at <https://www.whitehouse.gov/the-press-office/2016/02/22/remarks-president-national-governors-association-reception> [<https://perma.cc/A9A7-JXE2>]). This is despite statements of opposition from leaders of the Republican majority in Congress and from the major presidential candidates. Alexander Bolton & Vicki Needham, *GOP in no hurry to move Obama's TPP*, HILL (Jan. 6, 2016), <http://thehill.com/policy/finance/264882-gop-in-no-hurry-to-move-on-trans-pacific-partnership> [<https://perma.cc/3FAG-TSVW>]; *see also infra* notes 83 & 84.

China Seas, the unfinished and beleaguered quest for the TPP, and the legal dimensions of those policy agendas—reflect the uncertainties of long-term trends in the relative capacities and evolving preferences of the United States, China, and other states in East Asia.

Among the factors now contributing to the uncertainty is the possibility that the recent troubles in the Chinese economy reflect problems that will be serious and lasting and that may have significant political consequences. It may be that slowing growth rates, a tumultuous stock market, a sharply fluctuating currency, and government policy measures that have appeared to be less effective than in the past will be more than transient or manageable problems. If that is the case and China falls well short of the lowered expectations of a “new normal” of 7% to 7.5% growth—or the further lowered target of 6.5% growth to be adopted in the 13<sup>th</sup> Five Year Plan<sup>82</sup>—or faces internal weakness and instability, then a fundamental underpinning for the pivot and its legal component—the challenge of an inexorably and rapidly rising China—will be called into question. If so, and, along with it, the Obama-era policies and related legal tactics that have responded to China’s rapid rise will need to be reconsidered.

Another near-term event with potentially long-term consequences is the presidential election in the United States that will bring Obama’s successor to power in January 2017. Especially in China, Democratic Party frontrunner Hillary Clinton is widely seen as likely to be tougher on China than Obama was.<sup>83</sup> Accurate or not, this

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82. Hu Angang, *Embracing China’s “New Normal”: Why the Economy Is Still on Track*, FOREIGN AFF. (May-June 2015), <https://www.foreignaffairs.com/articles/china/2015-04-20/embracing-chinas-new-normal> [https://perma.cc/Y8V3-F3SR]; *Xi Expounds on Guideline for 13th Five-Year Plan*, XINHUANET, (Nov. 3, 2015, 9:52 PM) [http://news.xinhuanet.com/english/2015-11/03/c\\_134780297.htm](http://news.xinhuanet.com/english/2015-11/03/c_134780297.htm) [https://perma.cc/X4HF-2D6A]; see also Mark Magnier, *China’s Economic Growth in 2015 is Slowest in 25 Years*, WALL ST. J. (Jan 19, 2016).
83. Emily Rauhala, *Hillary Clinton’s Long—and Complicated—Relationship with China*, WASH. POST (Oct. 12, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/10/12/hillary-clintons-long-and-complicated-relationship-with-china/> [https://perma.cc/9WE5-NP9A]; Shannon Tiezzi, *Imagining U.S.-China Relations under (President) Hillary Clinton*, DIPLOMAT (July 30, 2014), <http://thediplomat.com/2014/07/imagining-u-s-china-relations-under-president-hillary-clinton/> [https://perma.cc/J8H2-V5W8]; *Issues: National Security*, HILLARY FOR AMERICA, <https://www.hillaryclinton.com/issues/national-security/> [https://perma.cc/8QG8-VTXC] (Hillary Clinton campaign website, stating, “[a]s secretary of state, Hillary reasserted America’s role as a Pacific power and called out China’s aggressive actions in the region. As president, she’ll work with friends and allies to promote strong rules of the road and institutions in Asia, and encourage China to

expectation is based in part on her central role as Secretary of State in articulating the pivot policy, including its security-related international legal components. On the Republican side, contenders for the nomination seem to be reprising a U.S. presidential campaign tradition of the out-of-power party criticizing the incumbent party for being too soft on China. The leading GOP hopefuls for 2016 seem to be doing this in especially strong forms.<sup>84</sup>

Possible changes in policy toward China are only part of the issue for the post-Obama prospects for the pivot and its legal sequelae. Changes in presidents can also bring changes in U.S. views on the importance and roles of international law. The Obama administration placed significantly greater emphasis on international law and presenting its foreign policy actions as conforming to international legal norms and rules than did the Bush administration. As we have seen, portraying the pivot in terms that emphasized or asserted the U.S. agenda's consistency with the international legal status quo arguably served the U.S.'s aims and interests during the Obama years. The next American president may, or may not, have a significantly different perspective. The challenges he or she faces in the East Asian region and the wider world may, or may not, be ones for which U.S. claims to support or advance established international legal principles and values will dovetail with U.S. interests and administration policy.

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be a responsible stakeholder—including on cyberspace, human rights, trade, territorial disputes, and climate change—and hold it accountable if it does not...”).

84. See, e.g., Mark Lander, *Campaign Season's Anti-China Rhetoric Likely to Cloud Meeting with Obama*, N.Y. TIMES (Mar. 30, 2016), <http://www.nytimes.com/2016/03/31/world/asia/campaign-seasons-anti-china-tone-is-likely-to-cloud-meeting-with-obama.html> [https://perma.cc/ZT4W-QTWQ]; David Nakamura, *Anti-China Rhetoric in Campaign Suggests Change under a New President*, WASH. POST (Sept. 23, 2015), [https://www.washingtonpost.com/politics/anti-china-rhetoric-in-campaign-suggests-change-under-a-new-president/2015/09/23/f6bb3066-61ff-11e5-b38e-06883aacba64\\_story.html](https://www.washingtonpost.com/politics/anti-china-rhetoric-in-campaign-suggests-change-under-a-new-president/2015/09/23/f6bb3066-61ff-11e5-b38e-06883aacba64_story.html) [https://perma.cc/KZ6B-HGBF] (explaining that, “China again has become a target for Republicans and Democrats alike on the presidential campaign trail. But foreign policy experts said there is mounting evidence that this time it’s more than a rhetorical gambit”); *Transcript of Republican Presidential Debate*, N.Y. TIMES (Jan. 15, 2016), <http://www.nytimes.com/2016/01/15/us/politics/transcript-of-republican-presidential-debate.html> [https://perma.cc/EL23-79K7] (Trump describing Obama administration negotiators with China as “political hacks who don’t know what they’re doing”; Cruz stating “China is running over President Obama like he is a child, President Obama is not protecting American workers and we are getting hammered”).